



# Ladybird Deeds

## Purposes and Usefulness

By Kary C. Frank

### Definition, history, and origin

A ladybird deed, sometimes written as Lady Bird deed, is not a deed in and of itself. Rather, it is a term that describes a method of transferring real property by a warranty or quit-claim deed.

Simply defined, a ladybird deed is a transfer of real property to a contingent grantee that reserves a life estate and the lifetime power to convey the property and unilaterally defeat the grantee's interest.

It is a classic example of retaining the power to take back with one hand what the other hand purportedly gave.

Before obtaining the nickname of ladybird deed, this type of transfer was commonly referred to as an enhanced life estate; namely, a life estate reserved in the grantor and enhanced by the grantor's reserved power to convey.

It is generally believed that the first ladybird deed was used by President Lyndon Johnson to transfer property to his wife, "Lady Bird" Johnson, upon his death. The name actually

came into existence when Jerome Ira Solkoff, a Florida attorney, used a fictitious cast of characters, which included Lady Bird, in his elder law materials to illustrate the usefulness of the enhanced life estate transfer.<sup>1</sup>

In fact, the ladybird type of transfer precedes Solkoff (and, for that matter, President Johnson). This type of transfer by deed was permissible under the common law of estates. It is a vested remainder subject to total divestment.<sup>2</sup> The most common ladybird-type transfer in Michigan is sanctioned by the Michigan Title Standards.<sup>3</sup> This standard is founded on the principle of powers of appointment. Consequently, the ladybird-type transfer is not a new phenomenon.

### Defining the transfer

Ladybird transfers have been fashioned in more than one manner. In a basic ladybird transfer, the grantor retains a life estate and the power to subsequently convey the fee. This power is generally expanded to include the power to gift, mortgage, lease, or otherwise dispose of the property.

If the drafter is concerned that a mortgage will be considered a conveyance and defeat the remainderperson's contingent interest, then the following definition of mortgage may also be included: "for purposes of this deed a subsequent mortgage by grantor shall not be a conveyance, but only a grant of a security interest."

### The Michigan Land Title Standards example

The Michigan Land Title Standards (6th) 9.3 is based on the law of power of appointment and reads:

Life estate with power to convey fee. The holder of a life estate, coupled with an absolute power to dispose of the fee estate by inter vivos conveyance, can convey a fee simple estate during the lifetime of the holder. If the power is not exercised, the gift over becomes effective.

The conveyance portion of a deed by a single woman could be drafted as follows:

**Alice Smith**, a single woman, of [address] quitclaims the described property to herself, Alice Smith, of [address] for her lifetime coupled with an unrestricted power to convey the property during her lifetime. This power to convey creates a general inter vivos power of appointment, which includes the power to sell, gift, mortgage, and lease (or otherwise dispose of the property) and to retain the proceeds from the conveyance. If not previously disposed of prior to her death, the property is conveyed to **Jimmy Smith**, of [address of default-donee].

Alice Smith is the grantor/donor (of the power of appointment) and the grantee/donee (of the power of appointment).

### Fast Facts

Before obtaining the nickname of ladybird deed, this type of transfer was commonly referred to as an enhanced life estate; namely, a life estate reserved in the grantor, enhanced by the grantor's reserved power to convey.

The ladybird deed has become a useful tool in Medicaid planning, estate planning, and probate avoidance.

Nearly all ladybird transfer issues have been considered and addressed in the Uniform Real Property Transfer on Death Act, which may serve as a better alternative to ladybird deeds. Michigan, however, has not adopted the act.

Jimmy Smith is a default-donee by power of appointment. If not previously disposed of before her death, the property is conveyed to Jimmy Smith. This ladybird transfer method is probably the most common method used in Michigan.

### Traditional, enhanced life estate example

The conveyance portion of the enhanced life estate deed by a single woman could be as follows:

**Alice Smith**, a single woman, of [address] (Grantor), quitclaims to **Jimmy Smith** of [address] (Grantee), the real property in... [insert description]

Subject to the following:

The Grantor reserves, during the Grantor's lifetime, a life estate coupled with an unrestricted power to convey, which includes the power to sell, gift, mortgage (for purposes of this deed a subsequent mortgage by grantor shall not be a conveyance, but only a grant of a security interest), lease and otherwise dispose of the premises during the Grantor's lifetime.

Alice Smith is the grantor and the grantee. Jimmy Smith has a vested remainder subject to total divestment. This method of transfer is seen in many Florida deeds and has also been used in Michigan.

## Uniform Real Property Transfer on Death Act (URPTODA) example

A general example of a URPTODA transfer is:

**Alice Smith** (Grantor), at my death, I transfer my interest in the described property to **Jimmy Smith**. Before my death, I have the right to revoke this deed.

Michigan has not enacted URPTODA.<sup>4</sup> The act addresses most of the ladybird transfer issues and may be a wise addition to the Michigan Compiled Laws.

## Defining the grantee

The remainderperson/default-donee must be thoughtfully designated.

Alternative provisions must be considered with regard to the potential of a predeceased remainderperson. The grantor may desire the gift to fail or go to the estate of the remainderperson should that person predecease the grantor.

The predeceased remainderperson contingency could be resolved by naming the remainderperson or his or her descendants by right of representation. This language, however, is similar to a devise in a will, which arguably requires the execution formalities of a will.

Tenants in common, joint tenants, or, under the proper circumstances, tenants by the entireties can be used to designate multiple remainderpersons.

The grantor can also name his or her revocable trust as the remainderperson. This transfer provides the grantor with a confidential beneficiary and the flexibility to designate alternate beneficiaries and confidentially change beneficiaries. There is no need for a certificate of trust to transfer or refinance the property. The ladybird deed transfer to trust is not limited to the grantor's revocable trust and could be used to transfer real estate to a special-needs trust or another person's trust.

## Lifetime transfer by grantor

If the grantor makes a lifetime transfer of the property, he or she should reference the power retained in the original deed. For example:

**Alice Smith**, a single woman, of **[address]** (Grantor), pursuant to the retained power to sell contained in the deed recorded in Liber **[number]**, Page **[number]**, **[County]** County Register of Deeds, quitclaims to **[herself or someone**

**other than the remainderperson]** of **[address]** the real property in...

## Medicaid

The ladybird deed has become a useful tool in estate planning and probate avoidance, but its recent popularity is attributable to contemporary elder law planning.

Ladybird transfers are approved by the Michigan Department of Health & Human Services. Because the grantor still has an unrestricted interest in the property, the transfer is not a divestment.<sup>5</sup> Also, if the property is the homestead, it remains a noncountable asset.

The ladybird deed becomes a primary document for an unmarried client who has few assets other than the exempt homestead. Before or after qualifying for Medicaid benefits, the client can execute and record the ladybird deed. The deed is a transfer-on-death document; therefore, the property does not become part of the probate estate, which currently exempts the property from Medicaid recovery proceedings. The future of the exemption (as with many elder law planning techniques) is subject to new legislation and Health & Human Services policy.

## Estate planning and probate avoidance

A ladybird deed—together with joint accounts, beneficiary designations, and transfers on death—can be used to establish a simple estate plan and avoid probate. This planning can be used with a single person or a married couple. A will should also be prepared, although technically it is not necessary if everything unfolds as intended. This provides a comparatively inexpensive estate plan to avoid probate. The problem, however, is that everything does not always unfold as intended, and there may not be enough flexibility to easily provide for contingencies. Nevertheless, under the right circumstances (for instance, a terminally ill client) similar planning could be used to avoid probate.

The ladybird deed can also be used to transfer real estate to the trust of the settlor. The transfer to trust does not take place until the death of the settlor (or both settlors, in the case of a joint deed/trust.) Using this method, the settlors can transfer or refinance the property without the hassle and expense of also filing a certificate of trust. Also, the grantor upon execution of the ladybird deed is not transferring the property until death; therefore, he or she still has an

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ownership interest and should arguably retain any title insurance coverage.

### Creditor protection

All real estate of any judgment debtor is subject to execution, levy, and sale, except as otherwise provided by law.<sup>6</sup> This includes, but is not limited to, interests acquired by contracts for the sale of land (whether in possession, reversion, or remainder); lands conveyed in fraud of creditors; equities and rights of redemption; leasehold interests, including mining licenses but not including tenancies at will; and all undivided interests whatsoever.

### Creditor vs remainderperson

The general notion is that the remainderperson of a ladybird deed has no interest in the property and no ability to transfer the property until the grantor dies. So, during the lifetime of the grantor, the remainderperson's creditors have no ability to reach the remainderperson's interest, if any.

Obviously, the situation changes upon the death of the grantor, at which time the property vests in the remainderperson. But before the grantor's death, he or she could transfer the property to another party (even by another ladybird deed) to defeat a creditor of the first remainderperson and the property would not be lost to a creditor.

Be aware that a remainder interest is subject to execution, levy, and sale. If the remainderperson's interest is characterized as a remainder, even though it is subject to divestment and may be difficult to value, it could be at risk.

### Creditor vs grantor or the grantor's estate

The ladybird deed does not offer creditor protection to the grantor. The grantor's reservation of the unilateral right to transfer would provide creditors with the ability to reach the property.

Generally, except for federal tax liens, a creditor of only one spouse cannot reach the debtor spouse's interest in entireties property. If the grantors of a ladybird deed are married and transfer the property to themselves for life as tenants by the entireties with a gift over, they have likely provided themselves with the same protections from creditors as they had before the transfer.<sup>7</sup>

A Michigan probate court held that once the grantor is deceased, the property vests as a transfer on death in the remainderperson. The grantor's estate has no interest in the



property and the property is out of the reach of creditors of the estate. Additionally, the ladybird-type transfer was found not to violate the Fraudulent Conveyance Act.<sup>8</sup>

### Federal taxation

The execution of a ladybird deed does not have federal gift-tax consequences. There is no ownership interest in the remainderperson until the death of the grantor. The remainderperson will receive a step up in basis, which is the fair market value of the property at the grantor's date of death.<sup>9</sup>

Because the grantor held an interest in the property up until the time of death, the full value of the property will be in the grantor's estate for estate- and gift-tax purposes.<sup>10</sup>

### Transfer affidavits and uncapping

Real property is uncapped when there is a transfer of ownership. A transfer of ownership does not include a transfer of that portion of property subject to a life estate retained by the transferor until expiration or termination of the life estate.<sup>11</sup>

Some commentators argue that a ladybird deed is not a transfer, but with the specific life-estate exemption, the best practice may be to file a property transfer affidavit with the appropriate box marked. When the assessor reviews the recorded deed, he or she will have a corresponding affidavit.

Using a ladybird deed, the property is not uncapped until the grantor dies without transferring the property. At that time, a property transfer affidavit is filed and the property is uncapped.

It was initially believed that uncapping would be avoided with a ladybird transfer of residential property between certain family members. *The Transfer of Ownership Guidelines* prepared by the Michigan State Tax Commission reinforced this belief with an on-point example. The current guidelines,<sup>12</sup> however, removed the example, and presumably at the death of the grantor of a ladybird deed (even a specific family member transfer of residential property), the property will uncapse.

A ladybird deed may not be the best transfer instrument if uncapping at the death of the grantor is a major concern. An alternative method, which may avoid uncapping, could be considered if the property is residential and the transferee is related to the transferor by blood or affinity to the first degree, and the use of the residential real property does not change following the transfer.<sup>13</sup> Also, relying on the *Klooster v City of Charlevoix*<sup>14</sup> decision, a transfer to joint tenants with rights of survivorship (including the grantor as one of the joint tenants) could be used to avoid uncapping under the proper circumstances.<sup>15</sup>

### Principal residence exemption

The grantor of the ladybird deed, who has a principal residence exemption, will retain the exemption provided the property continues as the principal residence.

A default-donee/remainderperson using the property as a residence will not receive a principal residence exemption because he or she does not hold a current ownership interest.

### Indexing

By statute, each register of deeds must keep a general index of instruments, which must include the name of each party to each instrument, and each computerized index must be maintained to allow for an alphabetical search of the names of each party to each instrument.<sup>16</sup>

With a ladybird deed, if the grantor exercises the retained power to transfer and has not also been listed as a grantee, a wild deed can result under the typical grantor/grantee index. With computerization of the indexes, this is not as big a problem as with the grantor/grantee index. In all cases, however, the title searcher is required to analyze the documents in more detail.

### Litigation

The ladybird transfer has been and will be litigated in the creditor rights and Medicaid arenas. However, as with contractual transactions, real property conveyances, and testamentary transfers, the heart of the transfer may be challenged. Capacity, undue influence, coercion, mistake, and fraud are

causes of action that will likely surface. Depending on the facts, these issues are initiated in the circuit court or probate court. The probate court may have exclusive or concurrent jurisdiction.<sup>17</sup> Therefore, review the transaction and select the appropriate (or in the case of concurrent jurisdiction, the desired) forum.

### Conclusion

The ladybird transfer has some weaknesses and unanswered questions. Perhaps the Uniform Real Property Transfer on Death Act would serve as a better alternative. Nearly all of the ladybird transfer issues have been considered and addressed in the act.<sup>18</sup> For now, however, the ladybird deed should serve as a versatile tool for many client situations. ■



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### ENDNOTES

1. Frank, *The Search for the Lady Bird Deed*, 34 Michigan Prob & Est Plan J 25 (2015) <<http://www.blmichiganlaw.com/MICHIGAN-PROBATE-ESTATE-PLANNING-JOURNAL.pdf>>. All websites cited in this article were accessed May 7, 2016.
2. Definition of this type of estate in land provided by Gerry W. Beyer, Governor Preston E. Smith Regents, professor of law, Texas Tech University School of Law.
3. Michigan Land Title Standards (6th ed), Standard 9.3.
4. See Uniform Law Commission, *Real Property Transfer on Death Act* <<http://www.uniformlaws.org/Act.aspx?title=Real+Property+Transfer+on+Death+Act>>.
5. Michigan Department of Health & Human Services, *Bridges Policy Glossary* (October 1, 2015), p 37 <Michigan Department of Health & Human Services, Bridges Policy Glossary>.
6. MCL 600.6018.
7. MCL 600.6023a.
8. *In the Matter of the Estate of Dolores Ann Davis*, 18 Quinipiac Prob L J 247 (2004-2005).
9. 26 USC 1014(a)(1).
10. 26 USC 2036(a).
11. MCL 211.27a(7)(c).
12. Michigan State Tax Commission, *The Transfer of Ownership Guidelines* (December 2014).
13. MCL 211.27a(7)(i).
14. *Klooster v Charlevoix*, 488 Mich 289; 795 NW2d 578 (2011).
15. *Id.* at 296.
16. MCL 565.28.
17. See MCL 700.1302; MCL 700.1303; MCL 700.7203.
18. See Uniform Law Commission, *Real Property Transfer on Death Act* <<http://www.uniformlaws.org/Act.aspx?title=Real+Property+Transfer+on+Death+Act>>.